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# Legal Issues in Managing Performance Problems

Many managers remark that their greatest problems often arise from dealing with underperforming staff. The purpose of this briefing is to assist managers by outlining the legal parameters to keep in mind when dealing with performance issues.

The *State of the Service Report 1999–00* of the Public Service and Merit Protection Commission makes a number of pertinent points regarding the Government's changes to public sector employment, in particular:

- the underlying thrust has been to shift responsibility for performance to individual agencies within the broad parameters of the *Public Service Act 1999 ('the PSA')*
- the Public Service should be run along the same lines as the rest of the workforce except where there are public policy reasons for not doing so.

## Implications for Clients

Management decisions relating to underperformance of APS employees must be carefully made as:

- successful handling of performance issues contributes to the overall health and success of an organisation, and
- not adequately addressing problems may expose agencies to litigation, even in some cases where those actions are well-intentioned and seemingly well planned.

## The Legislative Framework

**APS VALUES** The PSA is intended 'to provide a legal framework for the effective and fair employment, management and leadership of APS employees' (section 3(b) of the PSA). The APS Value contained in section 10(k) stresses that an agency focus on 'achieving results and managing performance'. Clause 2.12 of the Public Service Commissioner's Directions 1999 ('Commissioner's Directions') relates to this Value and provides that Agency Heads establish a 'fair and open performance management system' covering all employees. Each employee should be provided with a clear statement of performance expectations and an opportunity to comment on them. The detail of how this is done is for the agencies concerned.

**CODE OF CONDUCT** The APS Code of Conduct in section 13 of the PSA provides, in effect, for measures of employee performance. The Code of Conduct is expressed in broad terms and requires APS employees, to 'act with care and diligence in the course of APS employment' (section 13(2)), 'to comply with a lawful direction' (section13(5)) and at all times to 'behave in a way that upholds the APS Values and the integrity and good reputation of the APS' (section13(11)).

Section 15(3) of the PSA requires agencies to have procedures in place for dealing with suspected breaches of the Code of Conduct. The procedures must comply with requirements of procedural fairness. The Commissioner's Directions set out the

basic procedural requirements for determining breaches. For example, an employee must be informed of the case against him or her and the sanctions that may be imposed and must be given a reasonable opportunity to respond in relation to the expected breach (clause 5.2).

**SUSPENSION** Regulation 3.10 of the Public Service Regulations 1999 ('the PS Regulations') provides an employee may be suspended where the Agency Head believes on reasonable grounds that:

- the employee has or may have breached the Code of Conduct, and
- suspension is in the public, or agency's, interest.

**MEDICAL EXAMINATIONS** Regulation 3.2 of the PS Regulations gives a power to direct an employee to attend a medical examination to assess fitness for duty. This power may be exercised where the employee's health may be affecting work performance or conduct.

**COMPENSATION ISSUES** Where an employee is undertaking, or has completed, a 'rehabilitation program' in accordance with the *Safety Rehabilitation and Compensation Act 1988* (the SRC Act) the employer is obliged to take all reasonable steps to provide, or assist the employee to find, 'suitable employment' (section 40 of the SRC Act).

Where an employee has a medical condition which is a compensible injury under the SRC Act, liability to pay compensation under the SRC Act can persist after any termination of employment. For example, if the employee remains incapacitated for work by the injury, the employee will continue to be entitled to compensation under the SRC Act for that incapacity. The level of compensation payable will be reflected in the premiums paid by the agency to Comcare. SRC risks should be assessed by an agency in considering termination of employment on performance grounds connected with medical conditions and consultation with Comcare is appropriate.

**DISMISSAL** Section 29(3) of the PSA sets out the grounds for termination of ongoing employees. The following grounds may be relevant for underperforming employees:

- non-performance, or unsatisfactory performance, of duties (section 29(3)(c))
- inability to perform duties because of physical or mental incapacity (section 29(3)(d)), and
- breach of the Code of Conduct (section 29(3)(g)).

In section 29(3)(c) non-performance means a refusal or inability to perform so as to repudiate the contract.

As to section 29(3)(d), it is important to note that if the employee is a member of either the CSS or PSS termination is not legally available unless the relevant superannuation authority has certified in writing that the employee is entitled to invalidity retirement benefits under its scheme (section 54C of the *Superannuation Act 1976* and section 13 of the *Superannuation Act 1990* respectively).

**UNFAIR AND UNLAWFUL DISMISSAL** The provisions relating to termination of employment in the PSA are generally subject to the *Workplace Relations Act 1996* ('the WRA'). An employee can generally make an application under section 170CE of the WRA to the Australian Industrial Relations Commission ('the AIRC') for relief in respect of the termination of their employment on the ground that the termination was 'harsh, unjust or unreasonable'.

Liability under the WRA for unfair termination will be avoided if termination is for a valid reason, the employee was given an opportunity to respond to any reason relating to their capacity or conduct, and

termination was not otherwise harsh, unjust or unreasonable.

It is unlawful to terminate an employee's employment because of temporary absence from work because of illness or injury (section 170CK(2)(a)) or because of physical or mental disability (section 170CK(2)(f)). An exception is where termination is based on the 'inherent requirements' of the position (section 170CK(3)).

A 'temporary absence' is broadly defined. In general, if an employee provides a medical certificate for the illness or injury (whether the employee is on paid or unpaid sick leave), and if the employee's absence has not extended more than three months, the absence is a temporary absence covered by section 170CK(2)(a). An absence longer than three months may also be a temporary absence if the employee is on paid sick leave for that longer period. (Regulation 30C of the Workplace Relations Regulations.)

**NOTICE** An employer must give the required period of notice where employment is terminated (section 170CM(1) of the WRA). An exception is where the employee is guilty of 'serious misconduct'. This means misconduct of such a nature that it would be unreasonable to require the employer to give notice. Regulation 30CA(2) of the Workplace Relations Regulations gives examples of serious misconduct, namely, theft, fraud, assault, intoxication at work or disobeying directions.

**DISABILITY DISCRIMINATION** The *Disability Discrimination Act 1992* ('the DDA') makes it unlawful to discriminate against an employee with a disability. Section 5 of the DDA relates to 'direct' discrimination where a person discriminates against another person on the ground of or because of the other's disability. Section 6 relates to 'indirect' discrimination and provides that discrimination includes where the discriminator requires the other person to comply with a 'requirement or condition which is not reasonable having regard to the circumstances of the case'.

However, discrimination is not unlawful if the employee is unable to 'carry out the inherent requirements of the particular employment' or if to make accommodations to enable the employee to carry out the inherent requirements would impose 'unjustified hardship' on the employer. These exceptions are limited to offers of employment and dismissals (section 15(1)(b), 15(2)(c) and 15(4) of the DDA. Before taking action it is necessary to take into account the person's past training, qualifications and experience, performance as an employee (with the present employer) and any other relevant factors (section 15(4) of the DDA).

**ADMINISTRATIVE LAW REQUIREMENTS** Employment decisions made under the PSA are generally required to be made in accordance with the requirements of administrative law. A failure to comply with these requirements may render a decision liable to be set aside on judicial review (for example, under the *Administrative Decisions (Judicial Review) Act 1977*).

Administrative law requirements include an obligation of procedural fairness. This generally requires that an employee be given a reasonable opportunity to comment on the basis of any proposed decision adverse to the employee.

## Principles and Procedures in Dealing with Performance Problems

**AGENCY WIDE ISSUES** A general framework for dealing with performance issues should be established. Agencies should ensure that:

- clear and practical performance management frameworks are established and followed

- the general parameters in the Code of Conduct have been supplemented, where appropriate, with agency specific directions and policies
- employees are made aware of these performance management procedures
- APS employees have a clear understanding of what is expected of them, their duties, performance standards and attendance
- an explanation is provided to staff as to how underperformance may impact on the reputation and operational requirements of the agency
- employees are familiar with APS Values and the Code of Conduct
- employees receive appropriate performance training
- there are measures in place to ensure compliance with anti-discrimination laws.

**HANDLING PARTICULAR CASES** What are the legal issues to keep in mind where a manager is considering how to handle a case of underperformance? The following approach is suggested, not just because it is in line with good management, but also because it makes actions by managers more able to be justified legally.

**BE OBJECTIVE** There are often personal factors or issues in the workplace that may distract the manager. However, it is important to be fair and to act on the basis of facts. It may well be appropriate to seek advice at an early stage from an outside human resources expert or a lawyer.

**COUNSELLING/ WARNINGS – BE SPECIFIC** The manager should find that a performance management system has been established that is 'fair and open' and that the agency is focussing on results. Thus the manager must ensure that the expectations for the job are made known to the employee.

In discussing performance issues it is critical that the manager be specific in addressing the perceived remedies and necessary changes required. This should be done in such a way which gives the employee an opportunity to comment and if possible, redress the shortcoming. A specific review date should also be included giving the employee a 'reasonable' time frame in which to rectify any problems.

The review should address each issue raised in the counselling or warning, giving the employee the opportunity of detailing what action he or she has taken. Additional underperformance issues, or issues that arise during the review process may need to be considered as a separate matter. It may be unfair to the employee if they are simply added to the current warning. Avoid, of course, the 'cloak and dagger approach'.

**THE PAPER TRAIL** Actions by managers in managing the underperformance of an employee must be well documented. The manager should check to see what records exist relating to the employee's performance. Many cases are received by lawyers with the instruction that an employee has been a problem for years, but on examination there is no documentary record of this. It may be relevant for a manager to record any informal discussions with the employee which have alerted the manager to the problem.

Records of attempts by managers and the employee to address the underperformance, such as counselling or training should similarly be recorded. Records should be placed on the employee's personal file where they relate to formal processes such as counselling. It may also be appropriate for a copy of the record to be provided to the employee for reasons of procedural fairness. In other cases it may be enough for the manager to keep a copy of the document.

**BREACHES OF THE CODE OF CONDUCT** In many cases, an underperformer will, in some way, be in breach of the Code of Conduct. Not every suspected breach must be dealt with formally. Indeed, it may be considered poor management practice to initially adopt this approach. A more effective way of initially dealing with possible breaches of the Code of Conduct may well be counselling. However, there will be other cases where formal action is appropriate and where the suspected breach is more serious or the employee has a pattern of misconduct, this should be considered.

**REDEPLOYMENT** Where an employee is incapacitated or not coping, redeployment within the agency should be considered.

**MEDICAL ISSUES** It is critical that any medical issues be considered and taken into account. It may be necessary to obtain a report from an appropriate medical practitioner. In some cases this may form the basis of a 'graduated return to work' plan.

If an employee is consistently absent from work agencies should check, as far as is reasonable, whether there are any mitigating factors contributing to the absences (for example, stress and anxiety disorders).

If the employee is acting in a dysfunctional way in the workplace this may be the manifestation of a medical condition. It may be appropriate for the employer to take steps to find out the nature of the condition. As noted above there is power under the PS Regulations to direct the employee to attend a medical examination. It should not be immediately assumed that the employee is a 'misconduct' case.

Where an employee is incapacitated it should generally be suggested the employee use available leave, at least in cases where this may enable the employee to overcome the difficulty.

**TERMINATION WHERE MEDICAL ISSUES** If medical opinion is obtained and the nature of the condition brings into question whether the employee is able to do the job, it is necessary to consider the availability of any termination grounds (unsatisfactory performance, non performance or inability to perform). If a disability is involved, it is also necessary to consider the 'inherent requirements' of the position and the possibility of reasonable accommodation of the disability. To determine this the employer may need a written opinion from a person who has detailed knowledge of what is needed to do the job. The employer is then in a position to make a proper decision about termination of employment. This, of course, is a procedure which calls for skill and judgment. Further, it is necessary to ensure that any termination is not otherwise harsh, unjust or unreasonable. If the employee is in the CSS or PSS schemes the need for a certification by the relevant superannuation board as to invalidity benefits must also be remembered.

**TERMINATION ON OTHER GROUNDS** Again a careful review of the case is necessary before this is done. The circumstances of the case must be reviewed. Important questions will include:

- what is the reason for the proposed termination, how serious is it, and is there evidence of problems over a period?
- has the employee been given a 'fair go', in particular, has the reason been made known to the employee who has then had a reasonable opportunity to respond?
- have formal warnings been given to the employee?
- have the above matters been well documented and is the evidence reliable?

## Case Examples

A selection of decisions is given below. Many are from the private sector. However, the general principles are of guidance.

**MEDICAL ISSUES: DISTURBED BEHAVIOUR BY AN EMPLOYEE**

A vexed area is where an employer does not know of an employee's disability but is aware of disturbed, often aggressive behavior, resulting from the disorder.

*X v McHugh* (1994) 56 IR 248 was heard by Sir Ronald Wilson as President of the Human Rights and Equal Opportunity Commission. X was an auditor with the Auditor-General for the State of Tasmania. His employment was terminated because of an unsatisfactory probation report. During his probationary period he showed great difficulty working with clients and with other staff members. Before the end of the probationary period, X's supervisor became convinced that X's employment should be terminated and, it appears, persuaded the Auditor-General of this view. Some two months later a medical report was submitted by X's general practitioner which referred only to a serious medical condition that the practitioner said was not likely to re-occur. (X had requested that his practitioner not mention the nature of his medical condition.) The Auditor-General terminated X's services. Some time after that, further medical opinion from a psychiatrist became available which indicated that X had paranoid schizophrenia of a mild type and that this could be controlled with medication.

An important issue was whether or not the discrimination could be excused on the basis that X was unable to perform the 'inherent requirements' of his employment. Sir Ronald found that the onus rests on the employer of persuading the Commission of this. He found that after X's problem became apparent his employer went out of the way to ensure that he had limited exposure to clients. Sir Ronald concluded that X had not been given a fair chance to prove his capacity to carry out the inherent requirements of the job and in fact there was evidence that he could. He noted that it was 'most regrettable' that X had not been 'more frank' with his employer with respect to his medical condition.

The Auditor-General was found liable and ordered to pay $20,000 compensation to X for loss of income.

However, in the recent decision of *Tate v Rafin & Wollongong District Cricket Club Inc* [2000] FCA 1582, Wilcox J in the Federal Court took a narrower interpretation of discrimination. Mr Tate was a Vietnam veteran who suffered from Post Traumatic Stress Disorder. This caused him to behave in an unacceptably aggressive way leading to his expulsion from a cricket club after he was not selected for a team. The club had no knowledge of his disorder and had not asked him to undertake duties which were not reasonable. The court found it had not discriminated against him.

It should be noted, however, that this case was not in an employment context. An employer may often have more reason to be aware of an employee's condition and thus the precedent should be treated carefully for present purposes.

**MEDICAL ISSUES: OHS CONSIDERATIONS**

In *Melville v Cumnock No. 1 Colliery* (13 October 1999, AIRC, unreported), the employer, following advice from a medical specialist, terminated Mr Melville's employment based on his unfitness for work. Mr Melville was a mine maintenance fitter and welder. He had been transferred from underground maintenance to mine surface work after having being assessed as unfit to safely work underground following a number of incidents in which he had become disoriented and

had to be rescued. Years later Mr Melville suffered several further work-related injuries.

The employer sought a medical opinion from a medical specialist who had the relevant experience and reputation to assess Mr Melville for continued employment in the industry. The medical specialist assessed Mr Melville as being unfit for work. Mr Melville was given many months to provide a specialist medical opinion stating that he was fit to work but did not. The employer subsequently terminated Mr Melville's employment. The AIRC concluded that the dismissal was justified.

**FAILING TO MEET AGREED OUTCOMES**

In *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 the AIRC found that the decision to terminate Mr Crozier's employment was justified. He had accepted a job on the basis that he was to acquire new business in a difficult market. Mr Crozier was unable to do so and in six months of employment he had only succeeded in generating new sales of $1300. The decision was upheld by the Full Federal Court on 1 August 2001 [2001] FCA 1031.

**WARNINGS NOT SUFFICIENTLY SPECIFIC**

In *Rouse v Minit Australia Pty Limited* (2 September 1997, AIRC, unreported) Mr Rouse had been employed by the respondent for six years as a shoe repairer/engraver/key cutter. He operated a one person outlet within a shopping centre. Employees in his position were required to follow the steps in a customer services handbook designed to maximise sales. His employer alleged that he had been dismissed as he was unable to meet company sales standards and that there had been ample warnings about this.

The AIRC found that the employer had issued written warnings about the performance which mentioned unacceptable sales performance and failure to achieve company sales standards. During the hearing the real reasons for his dismissal became clearer. Representatives of the employer gave evidence that Mr Rouse was not trying to sell to every customer and was abrupt with customers. However the written warnings which had been given to him did not state the particular shortcoming which needed to be corrected. The AIRC considered that Mr Rouse had not been given opportunity to address what management considered were his shortcomings. It found that the dismissal had been unfair and ordered that he be reinstated to his former position.

**COUNSELLING PROCEDURES**

In *Anderson v Groote Eylandt Mining Company Pty Ltd* (2000) 102 IR 5, Mr Anderson who was not well-educated and had poor literacy skills, was absent on a number of occasions without explanation or prior advice. His employer dismissed him. This was set aside by the AIRC which found that the employer had not fully advised him as to the disciplinary procedures to be followed, especially his right under the procedures to have a union delegate involved.

*Singh v Australian Taxation Office* (15 July 1998, AIRC, unreported) is an example of a thorough approach by an employer. Mr Singh had been employed by the Australian Taxation Office ('the ATO') as an information technology officer. His letter of appointment specified a six month probationary period which could be extended if the ATO had any doubts. Mr Singh's three month report recommended a continuation of his probationary period as his performance was said to be unsatisfactory. His six month report recommended he be made permanent. However very shortly thereafter unsatisfactory aspects of Mr Singh's employment came to attention. In particular, reports indicated that his work rate was below the standard required and he had difficulty in understanding the

duties involved. Counselling took place evidenced by a proper record. Mr Singh was moved to a different team and his performance monitored. A further report recommended that Mr Singh's probationary employment be terminated. Mr Singh was given an opportunity to comment on this. He initiated a grievance procedure as he believed he was being treated unfairly. A thorough investigation was carried out and none of Mr Singh's grievances were found to be established. A final opportunity to persuade management not to accept the recommendation of termination was offered to Mr Singh but he declined this opportunity. The Commission found that termination of his employment was not harsh, unjust or unreasonable. It held Mr Singh had been informed of the areas of his work that were unsatisfactory and given an adequate opportunity to improve. Further, Mr Singh had been warned prior to the recommendation of termination about his poor performance.

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